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No. ~~1000~~ 109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, granting the Motion of Petitioner, Time, Inc., for a Directed Verdict is reported in *Pape* v. *Time, Inc.*, 294 F. Supp. 1087 (1969), and is reproduced as Appendix "A", *infra.*

The first opinion of the Seventh Circuit is reported in *Pape* v. *Time, Inc.*, 318 F. 2d 652 (1963), and is reproduced as Appendix "B", *infra.* The second opinion of the Seventh Circuit is reported in *Pape* v. *Time, Inc.*, 354 F. 2d 558 (1965), and is reproduced as Appendix "C", *infra.* The third opinion of the Seventh Circuit, the review of which is now sought, is presently unreported; it is reproduced as Appendix "D", *infra.*

JURISDICTION.

The decision of the Seventh Circuit was rendered on December 15, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

The District Court granted a directed verdict for the defendant publisher at the close of all the evidence on the ground that the plaintiff, a public official under *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), had failed to sustain his First Amendment burden of proving with convincing clarity that an allegedly libelous news article was published with actual malice, *i.e.*, knowledge of falsity or serious doubts as to the truth.

The Court of Appeals reversed, holding that the writer's editorial decision to omit the word "alleged" in describing charges of misconduct against the plaintiff in an official Report of the U. S. Commission on Civil Rights was alone sufficient to permit a jury finding of actual malice.

The question presented is whether the Court of Appeals erroneously construed and applied the First Amendment test of actual malice formulated in *New York Times* and its progeny by considering only one isolated fact in the entire editorial process of writing and researching the article and by substituting the Court's editorial judgment and discretion for that of the writer.

STATEMENT OF THE CASE.

(a) Introduction—History of the Suit.

This is a suit for libel instituted against petitioner Time, Inc. by Captain Frank Pape of the Chicago Police Department. The alleged libel appeared in a news article in *Time* magazine on November 24, 1961. Time, Inc. originally moved to dismiss Pape's suit on the grounds that the article was a fair report of an official governmental document and was fair comment thereon. The District Court granted the motion and dismissed the cause. The Seventh Circuit reversed and remanded (with one Judge dissenting); the Seventh Circuit ruled that because of the article's omission of the word "alleged" in describing charges of official misconduct by Pape in a civil rights suit discussed in the 1961 annual Report of the U. S. Commission on Civil Rights, the article could be found by a jury to exceed Illinois common law bounds of fair report and comment. *Pape* v. *Time, Inc.*, 318 F. 2d 652, *cert. denied*, 375 U. S. 902 (1963). The opinion is reproduced as Appendix "B", *infra*.

After remand, this Court decided *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). Time, Inc. thereafter deposed Captain Pape and moved for summary judgment. The motion contended that Pape was a *New York Times* public official and could not sustain his First Amendment burden of proving actual malice. The District Court granted the motion, but on appeal the Seventh Circuit again reversed. The Court held that although Captain Pape was a public official under *New York Times*, on the record then before the court (*i.e.*, Pape's deposition) the failure of Time, Inc. to use the word "alleged" in reporting the Civil Rights Commission's discussion of the action against Pape required a trial. *Pape* v. *Time, Inc.*, 354 F. 2d

558, *cert. denied*, 384 U. S. 909 (1965). The opinion is reproduced as Appendix "C", *infra*.

The case was remanded to the District Court and a full jury trial ensued. At the close of all the evidence, the District Court granted a directed verdict in favor of Time, Inc.; the Court ruled that Captain Pape had failed to sustain his First Amendment burden of proving actual malice as required by *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964) and its progeny (Appendix "A", *infra*). On appeal, the Seventh Circuit reversed a third time, holding that because of the article's omission of the word "alleged" Pape had made a sufficient showing of actual malice to go to the jury. (Appendix "D", *infra*.)

(b) The Background of Pape's Libel Suit: Monroe v. Pape.

In 1961, this Court decided *Monroe v. Pape*, 365 U. S. 167. The Court held that the plaintiffs, Mr. and Mrs. James Monroe and their six children, were entitled to sue Captain Frank Pape under the Civil Rights Act (R. S. § 1979, 42 U. S. C. § 1983) for constitutional violations claimed to have been committed during a pre-dawn police invasion of the Monroes' apartment. Captain Pape at the time was Deputy Chief of Detectives of the Chicago Police Department and personally led the Monroe raid. (App. 137-141, 145.)[1] The Monroes charged that Pape and his squad of detectives entered the apartment without a warrant, roused the family from bed at gunpoint, forced Mr. and Mrs. Monroe to stand naked in the living room, ransacked the apartment, physically abused Mr. Monroe and the children, and held Mr. Monroe incommunicado at the police station for ten hours.

1. "App." citations herein refer to the printed Appendix filed by respondent Pape in the Court of Appeals and now lodged with the Clerk of this Court.

After this Court held that the Monroes' complaint was cognizable under the Civil Rights Act, Pape was tried by jury; the verdict was guilty and a judgment for $8,000 was entered against Pape on January 24, 1963. Pape did not appeal and the judgment was satisfied.

(c) The 1961 Report of the U. S. Commission on Civil Rights—JUSTICE.

Subsequent to the decision of this Court in *Monroe* v. *Pape* but *prior* to the trial, the U. S. Commission on Civil Rights issued its official 1961 Annual Report. The Civil Rights Commission was created by Congress in 1957 to investigate civil rights problems and make recommendations to the President and Congress (42 U. S. C. § 1975). The Commission's declared purpose is "to collect, study, and appraise information relating to civil rights throughout the country and to make appropriate recommendations to the President and Congress for corrective action." (Vol. 5, 1961 Report, p. ix).

Volume 5 of the Commission's 1961 Report—JUSTICE—contains the Commission's observations and findings concerning *Monroe* v. *Pape*. Chapter 2 of JUSTICE, entitled "*Unlawful Police Violence*" (with the sub-title "*Patterns of Police Brutality*"), cites and discusses *Monroe* v. *Pape* as one of eleven specifically enumerated examples of nationwide police brutality against Negroes. The Commission prefaces Chapter 2 with the statement that:

> "The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; *in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations.* In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. *The Commission is of the opinion*, how-

ever, that the allegations appeared *substantial enough* to justify discussion in this study." (Emphasis added.)

"*Unlawful Police Violence*" (Chapter 2) is divided into four separate classifications of police brutality: (1) racially motivated brutality to enforce segregation; (2) violence as punishment; (3) coerced confessions; and (4) the spontaneous use of force in making arrests. The *Pape* case is included within the fourth category as a spontaneous use of force; the Commission introduces the *Pape* case by the italicized subheading, *Search, seizure, and violence: Chicago 1958.* JUSTICE then summarizes the factual predicate for the *Pape* case by quoting Mr. Justice Frankfurter's language in his dissenting opinion in *Monroe* v. *Pape*, 365 U. S. at 203-04. The Commission's exact language concerning Pape (including footnotes) reads:

"**UNLAWFUL POLICE VIOLENCE**

* * * * *

"**Patterns of Police Brutality**

* * * * *

"*Initial Contact and Arrest*

* * * * *

"*Search, Seizure and Violence: Chicago, 1958.* The Supreme Court of the United States decided the case of *Monroe* v. *Pape*[82] on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Acts on the basis of a complaint which alleged that:[83]

> "* * * [O]n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of

> the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy'; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on 'open' charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family without criminal charges having been filed against him.

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82. 365 U. S. 167 (1961). See discussion in ch. 5 at 72-73, *infra*.

83. These are the words of Justice Frankfurter in dissent, 365 U. S. at 203-204."

(Commission footnote 82 alludes to another discussion by the Commission of *Monroe* v. *Pape* in Chapter 5 of JUSTICE; Chapter 5 discusses the probable effect of the decision in securing redress of future police brutality and violations of civil rights.)

The conclusions of the Commission from its investigation of police brutality towards Negroes are presented in Chapter 8 of JUSTICE. The Commission recommended to the President and Congress in that Chapter that specific remedial Civil Rights legislation be enacted to discourage and punish police violations of civil rights throughout the country (both in the South and North) (JUSTICE, pp. 105-13). JUSTICE was signed by all six of the Members of the Civil Rights Commission.

(c) The Time Article.

The *Time* article of which Pape complains is a report of the issuance of JUSTICE and reads as follows:

> CIVIL RIGHTS.
>
> Dawdling on the Corner.
>
> The new paperback has 307 pages and the simple title *Justice*. It is the last of five volumes in the second report of the U. S. Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text about police brutality in both the South and the North—and it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the commission.*
>
> The bluntly frank report tells of a police officer referred to only as "Y," in Dawson, Ga., who arrested Negro James Brazier for speeding in November 1957. It quotes Brazier: "When I first entered the door of the jail, 'Y' hit me on the back of the head and knocked me down and said 'You smart son-of-bitch, I been wanting to get my hands on you for a long time.' I said, 'Why you want me for?' 'Y' said, 'You is a nigger who is buying new cars and we can't hardly live. I'll get you yet.'" When Brazier was arrested again five months later by the same officer, Brazier's wife related: "'Y' then said, 'I told you I would get you.' James said, 'What do you want to hurt me for? I ain't done nothing. I got a heap of little chillun.' 'Y' said, 'I don't give a goddam how many children you got, you're going away from here.' 'Y' pulled out his pistol and stuck it against James' stomach."
>
> Beaten to Death. Continues the report: "Brazier's ten-year-old son pleaded with the officers to stop beating his father and was knocked to the ground by 'Y'; the victim was thrown onto the floor of the police car with his legs dangling outside. 'Y' kicked him twice in the groin, slammed the door on his legs, threw a hat full of sand into his bloody face, and drove off."

Brazier died five days later, and "Y" was never punished.

Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder. The police, says *Justice,* "broke through two doors, woke the Monroe couple with flashlights, and forced them at gun point to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy.' Another officer pushed Mrs. Monroe. Other officers hit and kicked several of the children and pushed them to the floor. The police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers." The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment.

Nursing and Flouting. The commission's report concedes that such cases may be "more dramatic than most," but it declares that police brutality is "a serious problem throughout the U. S.," that Negroes suffer from it most, and that "there are American citizens in the Deep South today who live in fear, partly because they do not know if local policemen will help them or the mob when violence strikes." To remedy the situation, the commission recommends federal grants to upgrade state and local police forces, a federal law permitting police victims to sue local governments instead of only the officers, who can seldom pay adequate judgments, and an amendment to federal law specifically banning police brutality and forced confessions.

Going beyond the report of the panel, Father Hesburgh issued a separate statement: "Personally, I don't care if the U. S. gets the first man on the moon if while this is happening on a crash basis we dawdle along here on our corner of the earth, nursing our

prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hyocrites to all the world."

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* Members of the scholarly panel: Chairman Dr. John A. Hannah, president of Michigan State University; Dr. Robert S. Rankin, chairman of Duke University's political science department; Robert G. Storey, former dean of the Southern Methodist University Law School; Spottswood W. Robinson 3rd, dean of Howard University Law School; Erwin N. Griswold, dean of Harvard Law School; the Rev. Theodore M. Hesburgh, president of Notre Dame University.

Pape claims that the article was false, libelous and published with actual malice because it stated, "The police, says JUSTICE, 'broke through two doors, [etc.]" instead of stating that the described acts of misconduct were merely unsubstantiated allegations in a complaint.

(d) Time's Editorial Process in the Writing and Researching of the Article.

The article was written by Edward F. Magnuson, a contributing editor for the National Affairs section of Time.[2] Before writing the article, Magnuson had read the entire JUSTICE Report; he also had read a press release of the Civil Rights Commission concerning JUSTICE and two current articles in the *New York Times* discussing JUSTICE's contents (Defendant's Exhibits "E", "G" and "H").

Magnuson testified that his journalistic purpose in writing the article was to report the news of the findings of a high level governmental commission (App. 248). Magnuson

2. Magnuson is a graduate of the Journalism School of the University of Minnesota. Before joining the staff of *Time* Magnuson worked for ten years as a reporter for the *Minneapolis Tribune* where he covered a variety of assignments, including the police beat (App. 246).

believed at the time he wrote the article that all the findings of the Commission and the incidents set forth in JUSTICE were true and reliable (App. 248-49). He testified that he specifically relied on the statements by the Commission in its Preface to Chapter 2 of JUSTICE that:

> "The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations" and ". . . the allegations [of misconduct] appeared substantial enough to justify discussion in this study" (App. 250-51).

Magnuson was asked why he did not state that the Pape episode was included in JUSTICE as simply allegations in the Monroes' complaint and instead wrote that JUSTICE said Pape did the things set forth in the complaint. Magnuson testified (App. 253-54):

> "Q. You understand the word 'complaint'?
> "A. That's right.
> "Q. You understand the word 'alleged'?
> "A. That's right.
> "Q. Therefore, while you did not find the word 'alleged' in the running head, 'Search, Seizure and Violence: Chicago, 1958', you did find it in the body, is that right?
> "A. I did, sir, yes; right.
> "Q. You found the word 'complaint'?
> "A. That's right.
> "Q. That said something to you other than the lack of the word 'alleged' in the title 'Unlawful Police Violence'?
> "A. *But the word 'alleged' there cannot be taken just in that context. It has to be taken in the context of the entire chapter.*"
>
> • • • • •
>
> "By Mr. Kaveny: Q. Well, I will read it again, sir. It says, '. . . on the basis of a complaint which alleged . . .'

"Mr. Reuben asked you a moment ago to tell us what you thought, so suppose you now tell me what you think. What did you think when you read, '. . . on the basis of a complaint which alleged . . .'? Tell us what that means to you.

"A. That means to me that the Commission in this case is reporting this incident in terms of a claim being made in a court by the Monroes, but you can't stop there.

"A. That does not tell me, sir.

"The Court: Let the witness finish answering. Proceed.

"By the witness: A. (Continuing) But in the context of the entire chapter, it is not a simple allegation because the Commission has also said that we will not include just an allegation that we have not verified in some fashion.

"Q. That is your conclusion from having read, '. . . on the basis of a complaint which alleged . . .'?

"A. I read the entire chapter.

"Q. There is more here than just an allegation or a complaint?

"A. In the context of this report there is more than an allegation involved here; that's right."

Magnuson further testified (App. 250-51):

"Q. What else within the four corners of Justice made you think that the report from Justice was true?

"A. Well, for one thing, the title of this chapter is 'Unlawful Police Violence.' It does not say 'Alleged Police Violence.' Then they go onto a subheading which says, 'Patterns of Police Brutality.' There is nothing about alleged, nothing about any doubts in the Commission's mind. The reference to the Pape incident is called, 'Search, Seizure and Violence in Chicago.' There is nothing about its being alleged or in any way doubtful, so this led me to think that it was entirely, convincingly true.

* * * * *

"Q. Did you believe that your article, when it appeared in *Time* magazine, was true?
"A. I certainly did."

After writing the article, Magnuson sent it to the Time research department to be checked for factual accuracy in accordance with Time's standard editorial procedure. The article in the normal course was assigned to Time researcher Karen Booth. Mrs. Booth testified that she read JUSTICE and then found and examined the following materials in Time's editorial reference file (commonly called the "morgue"):

(1) A *New York Post* article published February 27, 1961 in that newspaper and headlined "The Suit Against the Chicago Cops: A Father Recalls His Night of Terror" (Def. Ex. "I", App. 272, 378). The article, in James Monroe's own words, relates that Pape and his men woke Monroe by sticking guns in his chin, paraded him naked in front of his family, called him a "black son of a bitch" and "nigger", tripped and kicked one of the children; the article describes the ransacking of Monroe's apartment and quotes Pape as saying "If it's the last thing I do, I'm going to kill them two black niggers."

(2) A Time correspondent's private report from Chicago dated February 22, 1961 entitled "A Kicked-In Door (Take One)" (Def. Ex. "J", App. 273, 380). The detailed account of Pape's raid on the Monroe family filed by Time's Chicago correspondent after an independent investigation of the incident includes the statements that Monroe's son was knocked to the floor with the butt of a pistol as he opened the rear door for Pape and his men; the police forced Monroe naked from bed at

gunpoint; Mrs. Monroe was "snatched" naked out of bed with only a blanket wrapped around her; her closet and dresser was ransacked and the mattresses ripped open in the bedrooms during the search. The dispatch states that police cursed the children and the Monroes and when one of the girls tried to leave and call the police she was knocked down by one of the officers.

(3) A Time Washington correspondent's report dated February 22, 1961, entitled "Supreme Court" (Def. Ex. "K"). That report discusses the Supreme Court opinion in *Monroe* v. *Pape* and its consequences.

(4) A suggested news article by Time's Chicago correspondent, February 21, 1961, entitled "Terror On Trumbull Street" (Def. Ex. "L", App. 273, 390). Time's Chicago correspondent suggested "a look at this horror story" behind the *Monroe* v. *Pape* Supreme Court case including "brutal abuse, ransacking, false arrest, death threats."

(5) A report from Time's Washington Correspondent filed February 20, 1961, captioned "The Supreme Court" and "Another Monroe Doctrine" (Def. Ex. "M", App. 274, 391). The dispatch suggests a story on the *Monroe* v. *Pape* case and refers to the humiliation of Chicago Negro James Monroe in front of his wife and children as he was arrested and his apartment ransacked by Pape and 13 police officers.

(6) A 1951 report by Time's Chicago correspondent entitled "Chicago Cop" (Def. Ex. "N", App. 274, 392). This report refers to an incident prior to Pape's raid on the Monroes where Pape shot and killed a Chicago hoodlum, the sixth such person Pape has shot in the line of duty.

(7) A newspaper clipping dated December 21, 1947, headlined "THIS DEAD-EYE DICK POISON TO HOODLUMS" (Def. Ex. "O", App. 273, 393). This article in Time's morgue file describes Pape's shooting of his fourth victim in the line of duty; when a fleeing accused murderer lunged at Pape, Pape shot and killed him.

(8) A *New York Times* article February 21, 1961, entitled "High Court Backs Suing of Police" (Def. Ex. "P", App. 275, 394). The article recites the claims that Pape and twelve police officers broke into Monroe's apartment at 5:45 A.M., hit Monroe, made him and his wife stand naked while they searched the apartment without a warrant, then held Monroe illegally before releasing him without charges.

Mrs. Booth testified unequivocally that on the basis of her research of Time's files and her review of the entire JUSTICE report concerning police brutality, she was convinced that the Time article as printed was true (App. 271, 278-279).

Pape's evidence at the trial consisted of his testimony and the tesimony of his fellow police officers who had conducted the raid on the Monroes' apartment; the thrust of this evidence was that the police conducted the entry and search of the Monroe apartment and the arrest of Mr. Monroe in a gentle and polite fashion, without any physical or verbal abusiveness. Pape testified that the raid occurred because Mr. Monroe had been identified as a suspected murderer, a charge that later proved to be false. Apart from the cross-examination of Edward Magnuson and Karen Booth, Pape made no attempt to offer any evidence that the article was published with knowledge of falsity or with serious doubts as to its truth.[3]

3. The testimony of Mr. Magnuson in this regard is set forth at pp. 11-13, *supra*.

(e) The Directed Verdict in Favor of Time, Inc.

At the close of all the evidence, Time moved for a directed verdict on the ground that Pape had failed to meet his burden of proving actual malice as required by *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964) and later cases. The District Court granted the motion and directed a verdict for Time. In a Memorandum Opinion (Appendix "A", *infra*), the District Court thus explained the reasons for granting a directed verdict:

> ". . . [T]he plaintiff has the burden of proving 'with convincing clarity' that the article was published with actual malice. The statements set forth in the article were only allowed to be published after other articles and dispatches were consulted and a good faith determination made by the writer and the researcher that the Commission had included the quoted portions with the intention that the facts be taken as 'substantially' true. This case is far easier than the *New York Times* v. *Sullivan* case, *supra*, where there was no investigation whatsoever into the truth or falsity of the advertisement's representations. This case also does not fall within the *St. Amant* description of what kinds of publications fell outside the protections of the First Amendment.
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> • • • • •
>
> "Further emphasizing this conclusion is the possibility that if this case goes to the jury, that this would have a 'chilling effect' on the exercise of First Amendment rights and might compel a degree of self-censorship because of the reluctance on the part of a publication to enter into expensive litigation. *Dombrowski* v. *Pfister*, 380 U. S. 479. . . ."

The Seventh Circuit reversed and remanded, holding that Pape had sustained his *New York Times* actual malice burden so that the case should go to the jury (Appendix "D", *infra*).

REASONS FOR GRANTING THE WRIT.

The Court of Appeals for the Seventh Circuit is diametrically in conflict with this Court and other Circuits in defining and applying the First Amendment concept of *New York Times* actual malice. The Seventh Circuit has isolated and focused entirely upon one single factor to find actual malice, to the complete exclusion and disregard of all other evidence concerning the editorial methodology followed in preparation of the article and the uncontradicted beliefs of the writer and researcher that it was true. Even the most cursory reading of the trilogy of opinions of the Seventh Circuit in this case (Appendixes "B", "C" and "D" *infra*) plainly reveals one dogmatic and unswerving thesis, *i.e.*, that Time's omission of the word "alleged" in describing JUSTICE's account of the *Monroe* v. *Pape* episode is sufficient, *standing alone*, to allow a jury to find Time guilty of libel. Other *New York Times* decisions have rejected such a constrictive approach and have held that all evidence pertaining to the publication and its origin must be considered to establish actual malice with the "convincing clarity" required by the First Amendment.

The first Seventh Circuit opinion, written *prior* to *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), stated that under Illinois common law rules of libel a jury could hold *Time* liable because it "could read the *Time* article as stating that the Report said Pape and his fellow officers *did* what the Commission Report merely said the *Monroe* complaint *alleged they did.*" (Appendix "B", *infra* p. 6b.) Then, after the *New York Times* case had discarded common law libel concepts in favor of the First Amendment test of actual malice, the Seventh

Circuit in its second opinion purported to pay obeisance to *New York Times* and then ruled that omission of the word "alleged" in the *Time* article was sufficient to permit a jury to find *Time* guilty of *actual malice, i.e.*, "recklessness." In so holding, the Seventh Circuit quoted and relied upon the statement in its first and common law opinion declaring that *Time's* omission of the word "alleged" was sufficient to allow a jury to find a libel under the pre-*New York Times* rules. (Appendix "C", *infra*, p. 6c.)

Now, after a full trial on the merits of the constitutional issue of actual malice, the Seventh Circuit has again held unequivocally that omitting the word "alleged" *alone* constitutes a sufficient showing of actual malice to go to the jury. (Appendix "D", *infra*.) Despite the manifest and uncontradicted editorial belief of the writer that the article was true, and despite the unchallenged independent verification and corroboration of the article by the researcher, the Seventh Circuit has held that *Time* can be found guilty of actual malice because the writer truly reflected his conviction of truth and did not presume the reported charges against Pape were false because they were not yet supported by a jury verdict or judgment. In sum, the Seventh Circuit finds actual malice demonstrated because it disagrees with the author's editorial decision not to use the word alleged to express his good faith belief and understanding of the import of the Commission's JUSTICE Report.

We submit that there could not be a clearer or more direct conflict between the decision of the Seventh Circuit and the holdings of this Court and other Circuits. The importance of the issue presented clearly transcends the private interests of the parties and the scope of the special facts of the case. Involving, as it does, the con-

troversial role of the police and the civil rights movement in Chicago, the decision of the Seventh Circuit we believe cries out for review by this Court. If allowed to stand, the Seventh Circuit's decision will have precisely the "chilling effect" upon the exercise of preferred rights of free public discussion and debate that *New York Times* and its progeny were intended to remove. See *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Time, Inc.* v. *McLaney*, 406 F. 2d 565, 566 (5th Cir. 1969), *cert. denied*, 395 U. S. 922 (1969). The principles and objectives of the First Amendment compellingly favor a grant of certiorari in this cause to review and set aside the Seventh Circuit's holding.

I. THE SEVENTH CIRCUIT'S HOLDING DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

(a) The Conflict With This Court's Decisions.

The fundamental concept of actual malice as enunciated in *New York Times* requires a public official plaintiff, such as Pape, to prove "with convincing clarity" that the alleged libel was published "with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U. S. at 280.) This Court has subsequently amplified and elaborated the *New York Times* definition of actual malice in a series of decisions beginning with *Garrison* v. *Louisiana*, 379 U. S. 64 (1964).

In *Garrison*, the Court held that the "recklessness" concept of malice requires a showing of "a high degree of awareness of probable falsity" (379 U. S. at 67). In *Henry* v. *Collins*, 380 U. S. 356 (1965), the Court held that "intent to harm" does not suffice—there must be "intent to harm *through falsehood*" (emphasis added); the Court based its reversal of the *Henry* libel judgment on a jury instruction that erroneously allowed the jury to *infer* malice solely

"from the falsity and libelous nature of the statement" (380 U. S. at 357). Then, in *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81 (1967), the Court ruled that the failure of the defendant to make an investigation prior to publication is insufficient to constitute "recklessness." Finally, and most significantly, the Court held in *St. Amant* v. *Thompson*, 390 U. S. 727 (1968), that the concept of recklessness requires a showing by the plaintiff that the defendant "*in fact entertained serious doubts as to the truth*" of the publication (390 U. S. at 730; emphasis added).

The decision of the Seventh Circuit is, we submit, at complete loggerheads with every pronouncement of this Court on the subject of *New York Times* actual malice, beginning with the *New York Times* case itself. Indeed, the evidence that the Court held insufficient in *New York Times* to support a finding of actual malice was manifestly stronger than that adduced by Pape below. Thus, in *New York Times* the trial record disclosed:

> *First:* The *New York Times* had evidence in its own files (from news material it had previously published) demonstrating the falsity of several statements in the publication (376 U. S. at 263, 287-88).
>
> *Second:* The Secretary of the New York Times Company admitted he could readily discern that on its very face at least one statement in the publication was false (376 U. S. at 263-64).
>
> *Third:* The *New York Times* accepted and published the assailed advertisement without checking its accuracy against *anything*—either outside sources or the paper's own files (376 U. S. 287).

Upon such a showing, the Court held that the *Times* could not be found guilty of actual malice because the evidence would support "at most a finding of negligence" (376 U. S. at 288). In the case at bar, we submit that the

evidence *a fortiori* could not support a finding of actual malice, or for that matter even negligence. Here, the writer of the article, Edward Magnuson, was convinced that his description of the JUSTICE Report's narration of the Pape episode was true, and that omission of the word "alleged" was without editorial significance in light of the entire context of Chapter 2 of JUSTICE, including its preface, headings and sub-heads (see Statement of the Case, *supra*, pp. 12-13). So also, in marked contrast to the *New York Times'* complete *lack* of research or verification, the article in this case was submitted to a Time staff researcher, Karen Booth, and was comprehensively checked and verified with the materials in Time's "morgue" or reference file concerning Pape and *Monroe* v. *Pape*, all of which were consistent with the article's contents (see Statement of the Case, *supra*, pp. 13-15).

The Seventh Circuit disregarded this entire methodology of the writer and researcher and focused solely upon the omission of the word "alleged"; if this Court had followed the same approach in *New York Times* and looked at only one fact (such as the materials in the *Times'* files) the Court clearly would have found a sufficient basis for a finding of actual malice. Instead this Court considered *all* of the facts concerning the method and process followed in making the publication and held that there was no actual malice as a matter of law.

The decision below also squarely conflicts with *St. Amant* v. *Thompson*, 390 U. S. 727 (1968). There the record revealed that the defendant publisher had made *no* attempt to check or verify the truth of the alleged libel, had *no* knowledge of the plaintiff's past conduct, and had relied solely on the affidavit of a stranger whose veracity and credibility were unknown. This Court nonetheless held that the plaintiff had failed as a matter of law to make a submissible showing of actual malice in the sense of "reckless-

ness"; the Court declared that recklessness requires proof that the defendant "*in fact entertained serious doubts* as to the truth" of the alleged libel (390 U. S. at 730; emphasis added). Here, we submit, Pape has made not the remotest showing that either the writer, the researcher or anyone at Time, Inc. entertained "serious doubts as to the truth" of the *Time* article.

So also, the Seventh Circuit's decision is in flat conflict with *Beckley Newspaper Corp.* v. *Hanks*, 389 U. S. 81 (1969). In *Beckley* the defendant newspaper had accused the plaintiff of intimidation, threats and other misconduct as a public official; defendant admitted that (unlike in the instant case) *no* research or investigation had been conducted concerning the accusations, and that they were published because defendant believed there was a *possibility* they were true. This Court, in reversing a judgment for the plaintiff *per curiam*, considered the entire record and held that the evidence was insufficient to present a jury question of whether defendant acted recklessly. Again, the proof of actual malice in the instant case falls palpably short of the evidence held insufficient to go to the jury in *Beckley*. Here the article was comprehensively researched in accordance with Time's standard editorial procedure, and both the writer and the researcher believed the article *was in fact true*, not merely that there was a *possibility* it was true (as in *Beckley*).

Other holdings of this Court that we believe are at total odds with the Seventh Circuit's result below are *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Henry* v. *Collins*, 380 U. S. 356 (1965); *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker*, 388 U. S. 130 (1967) (Opinion of Mr. Justice Harlan). We respectfully submit that certiorari should be granted to review the Seventh Circuit's marked departure and regression from this Court's constitutional delineation of *New York Times* actual malice.

(b) The Conflict With Other Circuits.

The Seventh Circuit's approach in considering one single and narrow factor (omission of "alleged"), rather than *all* elements of the editorial process in writing and research of the article, is also in square conflict with the decisions of other circuits applying the *New York Times* doctrine. Virtually all other courts, both federal and state, have followed the constitutional mandate of *New York Times* and have examined *all* facts behind the preparation and writing of the publication in determining whether actual malice is a jury issue. Moreover, and signally, a cardinal feature of these decisions is their clear recognition that libel actions of public officials or public figures have a "chilling effect" upon the exercise of First Amendment rights of free public discussion and debate (see *Dombrowski* v. *Pfister*, 380 U. S. 479, 487 (1965)), and that such suits should be terminated as soon as possible when it appears that the plaintiff cannot sustain his burden of proving actual malice "with convincing clarity." This was clearly recognized by the District Judge below in his memorandum opinion granting Time, Inc.'s motion for a directed verdict (Appendix "A", *infra*):

> "Further emphasizing this conclusion is the possibility that if this case goes to the jury, that this would have a 'chilling effect' on the exercise of First Amendment rights and might compel a degree of self-censorship because of the reluctance on the part of a publication to enter into expensive litigation. Dombrowski v. Pfister, 380 U. S. 479 (1965), as cited in Time, Incorporated v. McLaney, ... F. 2d ....., No. 25585 (5th Cir. Jan. 3, 1969)."

To minimize the "chilling effect" of libel suits on First Amendment rights, decisions of other circuits have held that defendant-publishers are entitled to summary judg-

ments or dismissals without the necessity of submitting the case to a jury when it appears on the basis of *all* affidavits, depositions or other adduced evidence that the plaintiff cannot sustain his burden of proving actual malice. Thus, in *Time, Inc.* v. *McLaney,* 406 F. 2d 565 (5th Cir. 1969), *cert. denied* 395 U. S. 922 (1969), the defendant took an interlocutory appeal from the trial court's refusal to grant summary judgment against the plaintiff; the Fifth Circuit reversed and held that First Amendment considerations compelled immediate termination of the suit:

> "The subject matter of this litigation, involving, as it does, the very serious and timely question of how far the First Amendment guarantee of freedom of the press may still be impinged upon by actions for libel, places some cases in a somewhat different category. This follows when the trial court and this court jointly consider that the failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend the principles enunciated in *Dombrowski* v. *Pfister,* 380 U. S. 479, because of the chilling effect of such litigation." (406 F. 2d at 566.)

In the *McLaney* case, the allegedly libelous article accused the plaintiff of being connected with organized crime and gambling in the Caribbean. The Fifth Circuit observed that a "substantial investigation" had been made into the truth of the alleged libel and that the author had no reason to have serious doubts as to the truth of the publication. Precisely the same is true, we submit, in the instant case.

An equally emphatic declaration of the "chilling effect" principle is *Washington Post Co.* v. *Keogh,* 365 F. 2d 965 (D. C. Cir. 1966), *cert. denied* 385 U. S. 1011 (1967):

> "One of the purposes of the [New York] *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials,

is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. *The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes.* All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against the trial on the merits. *Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.* And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is hardly less virulent for being privately administered. *Smith* v. *People of State of California*, 361 U. S. 147 (1959)." (Emphasis added.)

To the same effect, and equally in conflict with the holding of the Seventh Circuit below, is *New York Times Co.* v. *Connor*, 365 F. 2d 567 (5th Cir. 1966).

The recent case of *Wasserman* v. *Time, Inc.*, ... F. 2d ..... (D. C. Cir., Docket No. 23,267, decided March 3, 1970) also clearly highlights the fundamental error of the Seventh Circuit in applying the *New York Times* doctrine. Although the Court of Appeals in that case held that summary judgment was inappropriate on the pre-trial record then before the court (compare the second opinion of the Seventh Circuit in the instant case, Appendix "C", *infra*) the opinion of Judge J. Skelly Wright (concurred in by Judge Spottswood W. Robinson, III) clearly delineated the correct constitutional procedure for evaluating and determining whether a *New York Times* plaintiff has made a submissible showing of actual malice:

"In my judgment *New York Times Co.* v. *Sullivan*

makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the Times test of actual knowledge or reckless disregard of the truth. * * *.

"If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with 'convincing clarity.' In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence. If the trial is permitted to proceed, the court will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence. If the motion for a directed verdict at this stage of the trial is denied, the actual malice issue, along with the other issues, is then submitted to the jury under the Times instruction without any indication from the court or counsel that the court has decided that the evidence shows actual malice with 'convincing clarity.'

"This two-step procedure in which *both the trial judge and the jury must find actual malice before there can be judgment for the plaintiff* provides the protection of the First Amendment freedom that Times sought to make secure in areas of public concern."

We submit that the Seventh Circuit's decision is also in conflict with *United Medical Laboratories, Inc.* v. *Columbia Broadcasting Systems, Inc.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied* 394 U. S. 921 (1969); *All Diet Food Distributors, Inc.* v. *Time, Inc.*, 56 Misc. 2d 821; 290 N. Y. S. 2d 445 (Sup. Ct. N. Y. Co., 1967); *Bon Air Hotel Inc.* v. *Time, Inc.*, 295 F. Supp. 704 (S. D. Ga. 1969); *Klahr* v. *Winterble*, 4 Ariz. App. 158, 418 P. 2d 404 (Ct. App. 1966); *News-Journal Co.* v. *Gallagher*, 233 A. 2d 1966 (Sup. Ct. Del. 1967); *Hurley* v. *Northwest Publications, Inc.*, 273 F. Supp. 967 (D. Minn. 1967), *aff'd*, 398 F. 2d 346 (8th Cir. 1968); *Thompson* v. *Evening Star Newspaper Co.*, 394 F. 2d 774 (D. C. Cir. 1968) *cert. denied*, 393 U. S. 884 (1969); *Walker* v. *Pulitzer Pub. Co.*, 394 F. 2d 800 (8th

Cir. 1968); *Ryan* v. *Dionne*, 28 Conn. Sup. 35, 248 A. 2d 583 (1968); *Tagawa* v. *Maui Pub. Co.*, 448 P. 2d 337 (Sup. Ct. Hawaii, 1968), *cert. denied*, 396 U. S. 822 (1969); *Sellers* v. *Time, Inc.*, 299 F. Supp. 582 (E. D. Pa. 1969).

(c) The Fundamental Misconceptions of the Seventh Circuit.

By concentrating entirely upon omission of the word "alleged"—an omission that was made by the writer in the sincere and undisputed belief that it was editorially irrelevant and in no way made the story untrue—the Seventh Circuit has undermined the central meaning and purpose of the *New York Times* doctrine and has created dangerous precedent in this critically important area of constitutional law. We submit this Court should forthwith rule that no court has the right to substitute its editorial judgment for that of a publisher; this clearly is the essence of First Amendment protection.[4] A good faith omission is as much entitled to constitutional protection as an outright falsity by erroneous statement. Does a publisher have the right in good faith to omit something that it believes to be editorially inconsequential? To state the question impels the answer—yet that is all that is involved in this case.

The Seventh Circuit's erroneous decision on the simple question stated above was based on two misconceptions, each basic to an understanding of the *New York Times* rule. First, it erroneously held that a knowledgeable editorial decision includes, by the very fact of knowledge of the decision (which any responsible journalist will always

4. The same question is involved in a case now pending before the Fifth Circuit Court of Appeals, *Ragano* v. *Time, Inc.* There the District Court (S. D. Fla.) refused to dismiss (302 F. Supp. 1005) but granted a motion for leave to appeal, which was also granted by the Court of Appeals. Briefs have been submitted but the case has not as yet been argued.

have), knowledge of falsity. Second, it erroneously held that a court is free to substitute its *own* editorial discretion for that of the publisher in making a judgment as to truth or falsity. Both conceptions are erroneous:

(1) Knowledge of falsity by reason of knowledge of omission.

The Seventh Circuit, in its anxiety to superimpose its own editorial judgment upon that of the Time writer and researcher, totally misapprehended the test it was required to apply in judging whether the publication was entitled to constitutional protection. Thus, in *New York Times*, this Court explicitly stated: "A defense for erroneous statements honestly made is no less essential here" (376 U. S. at 278.) and barred action on such statements, "believed to be true" (Id. at 279). Again, in *Garrison*, this Court stated that: "Utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth" (379 U. S. at 73).

The Seventh Circuit completely disregarded those utterances in reaching its conclusion that there was a basis for denial of constitutional protection; its conclusion was based solely upon the following statement:

> "However, Magnuson deliberately and knowingly failed to mention in his article that his story of the alleged conduct and action of Pape and the other police officers was based on an allegation in a complaint in a pending civil suit." (Appendix "A", *infra* at p. 4d).

All the court is saying is that Magnuson knew that he was omitting a fact. This does not cover the further, and essential point, that, in Magnuson's view (as testified at the trial) the omission of that fact made the story true. The essential inquiry is not whether Magnuson knew what he was doing—rather, it is whether Magnuson, knowing what he was doing, "honestly believed" in the truth of that which was said. What the Seventh Circuit in fact has

done after making its own editorial judgment of "falsification," is to find (without support) that the omission that led to its view of "falsification" was deliberate, and then bridge the gap of proof of lack of honest belief by a total *non sequitur, i.e.,* since what was said was false Magnuson failed to believe in the truth of what he said. That *non sequitur* is the crux of this case. One cannot infer knowledge of falsity from knowledge of an editorial decision deliberately to omit in order to print what the writer believed to be the truth. And that is the simple but basic question presented by this petition.

(2) The Circuit Court's unsound journalistic judgment—Time's version of what the Report said as a "falsification".

The Seventh Circuit's substitution of editorial judgment for that of the author and researcher was, as discussed above, totally in error and, in any event, the very fact that we make that point in this Court is sufficient to indicate that there is not and could not be on the part of Time a "high degree of awareness of probable falsity". We believe the Time story was true and constitutionally protected.

As confirmed in the press release issued by the Commission and used by Magnuson (App. 420-36) the Commission concluded that: "Indeed, a comprehensive review of available evidence indicates that police brutality is still a serious and continuing problem" (App. 421). That statement was corroborated by the specific finding to that effect set forth in the press release (App. 427). That same finding was included in the New York Times clip used by Magnuson (Ex. H, pp. 437-9). Is it believable that the United States Civil Rights Commission, with men of national eminence, would base a *finding* of police brutality on the mere allegation of a complaint?

Of course it is not conceivable and the reason that the

complaint's allegations were included in the Report was stated specifically by the Commission in its Introductory Remarks to the Chapter on "Unlawful Police Violence", *i.e.*, that the allegations had been investigated and "*the allegations appear substantial enough to justify discussion in this study.*" (Emphasis added.) Thus, on the face of the Report, it appeared that the quotations from the complaint were not inserted *qua* allegations of a complaint but, rather, as statements of fact that had been substantiated.

If Time, Inc. were to report on the Report, its report could hardly be "true" if it merely repeated the allegations of the complaint as being allegations of a complaint for, in truth, and as presented by the Commission in its complete Report, those allegations were allegations of fact which had been investigated and were substantial enough to merit a finding by the Commission of police brutality. To say, then, that Time's story was a "falsification of what the Report said", is far from the truth, for Time's story correctly reported and interpreted the thrust of the Report.

Moreover, Booth, the researcher, who re-checked Magnuson's judgment as to what the Report said, had available in her files, aside from the complaint in the *Monroe* action, proof of the truth of those allegations. Time's Chicago reporter Doust had reported in his dispatch of February 22, 1961 (Ex. J, pp. 380-83) the complete truth of the entire story and that dispatch was backed up by the New York Post clipping of February 27, 1961, used by Booth, quoting Monroe as to his side of the story in detail (Ex. I, pp. 378-9). And those facts were also substantiated by the dispatches of 3/24/51 and 12/21/47 (Exs. N, O, pp. 392-3), branding Pape as a "Killer Cop".

Moreover, the correctness of Time's view that the "allegations" spoke the truth and that the Commission's Report so reported them, was later confirmed by the fact of a

jury verdict against Pape and in favor of Monroe when the case was tried in court, as shown by the verdict itself (Exs. B, C, D—pp. 371-3) and the then current newspaper reports of that verdict (Exs. Q, R, S, T—pp. 395-8).

What more does one need to arrive at a belief of the truth? The Report on its face, as available to Magnuson and Booth and judged by them, was more than a report of mere allegations of a complaint. Booth knew that it was backed up by specific dispatches to the effect that the story was true. And, thereafter, a jury verdict found the story was true. To have published the story as suggested by the Court of Appeals in its opinion would have been poor journalism because it would have been untrue—and that is the very reason Courts should not attempt to be journalists and the very reason why the First Amendment bars such an attempt. If ever a man appeared to have been guilty of what was said, it was Pape, despite his protestations to the contrary. And if ever anyone acted "in good faith" and "honest belief" in truth, it was Magnuson and Booth. And that should be the end of the case under *New York Times*.

The District Court clearly agreed with this position, with the truth of the Time story and with Magnuson's "personal good faith" (App. 447). That agreement, it seems to us, is significant. If Time's position was sufficient to convince the District Court, that position even if erroneous as to the literal and technical truth of the story, can hardly give rise to that "high degree of awareness of probable falsity" needed in order to lose the protection of the Constitution. See the statement of Judge Skelly Wright in *Wasserman* v. *Time, Inc.*, quoted at pages 25-26, *supra*. A mere reading of the testimony of Magnuson (App. 248-262), plus the exhibits relied on by Booth (Exs. I-O, App. 378-393) should suffice to show their good faith. Apparently, the Seventh Circuit neglected to

read the record, despite the District Court's hearing and seeing the witnesses and exhaustive review of the testimony and exhibits.

II. THE GRAVELY CHILLING EFFECT OF THE SEVENTH CIRCUIT'S DECISION.

As previously discussed, both this Court and other Circuits have recognized and squarely held that avoidance of a chilling effect is necessary to maintain the vitality of the First Amendment. The instant case and the proceedings below place in bold relief the insidious and chilling effect of a failure to terminate a libel suit involving the public interest at the earliest possible moment. The petitioner has been in litigation since 1961 and has been required to defend extensive pretrial proceedings, a trial on the merits and three appeals. We believe that in light of the history of this cause and the present remand, allowing the Court of Appeals' decision to remain undisturbed must necessarily inhibit all but the hardiest of publishers. Indeed, in light of all that has transpired in the instant case, if, as we believe, the Seventh Circuit's decision below is in error, the necessary expense and travail that has and will transpire here must have a manifest chilling effect.

Moreover, and we think cardinally, if a jury trial is compelled in this case in contravention of the *New York Times* cases, the chilling effect upon publishers will be compounded incalculably. The 1968 Democratic Convention in Chicago has engendered strong and violent emotions in much of the City of Chicago concerning the role and conduct of police. Thereafter, the city was harshly divided by the September 1969 Weathermen convention and the December 1969 Black Panther investigation.

The recently concluded and much publicized Conspiracy Trial has increased this emotional pitch. At this time,

there would be scant few publishers that would not be reluctant to submit to a jury trial in a libel suit involving the conduct of Chicago police in Chicago in 1970. If the decision below is allowed to stand, many publishers in the future may well avoid the plight by simply not printing about Chicago, its police and its violence.

CONCLUSION.

For the reasons set forth above, we submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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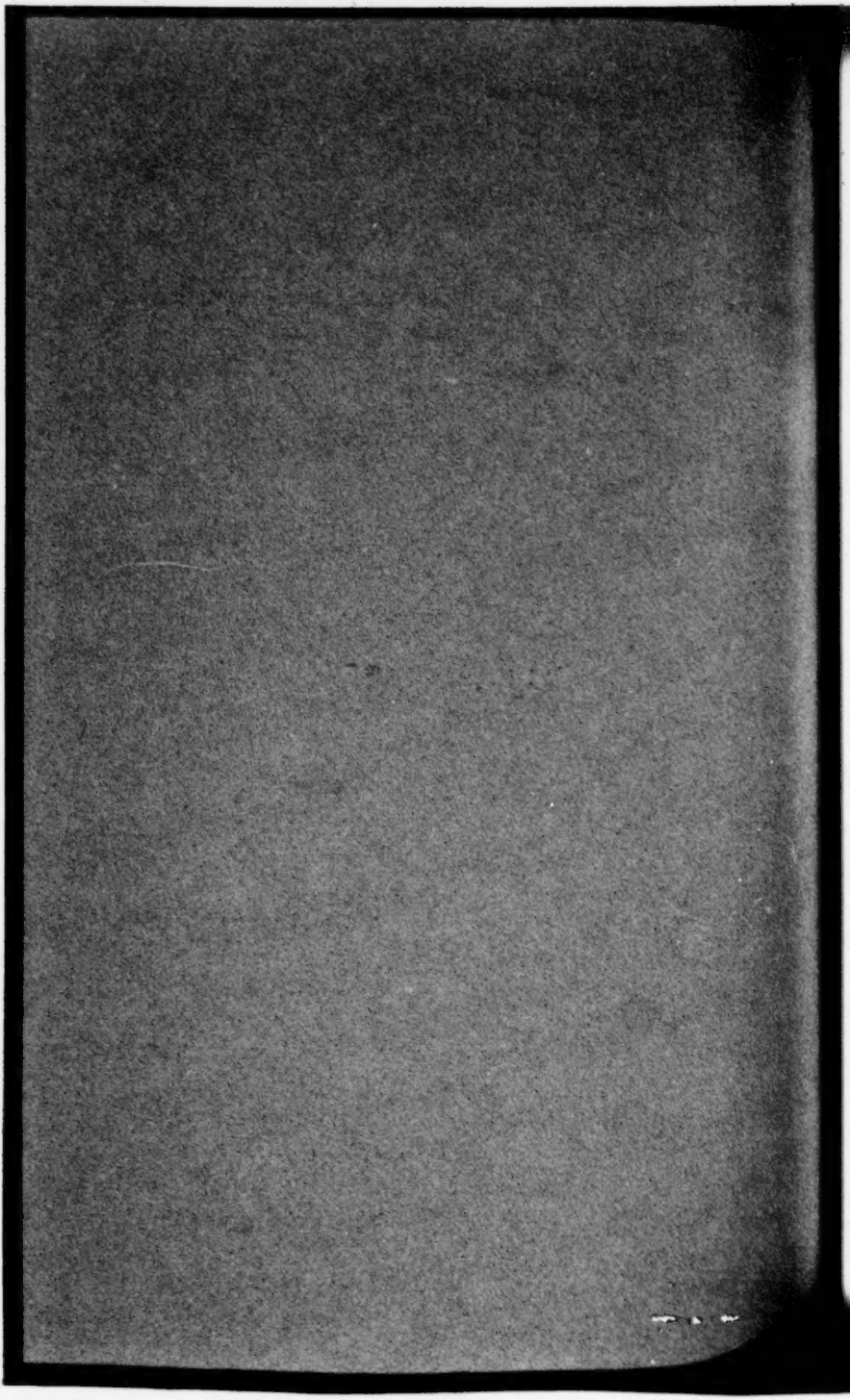
March 10, 1970.

Appendix



APPENDIX "A".

Opinion of the United States District Court for the Northern District of Illinois, Eastern Division.

FRANK PAPE, *Plaintiff*,

vs.

TIME, INCORPORATED, *Defendant*.

No. 61 C 2202.

THE HONORABLE EDWIN A. ROBSON, *District Judge*.

The defendant has moved for a directed verdict at the close of all the evidence. For the reasons set forth below, this court is of the opinion that the motion should be granted.

The plaintiff, Frank Pape, is suing Time, Incorporated for libel allegedly arising out of an article published November 24, 1961, which described the search of James Monroe's apartment on the west side of Chicago and Monroe's subsequent arrest by the plaintiff and seven fellow police officers. The plaintiff is a "public official," *Pape* v. *Time, Incorporated*, 354 F. 2d 558, 560 (7th Cir. 1965), and in order for such a public official to recover a libel judgment against the present defendant, he must prove "with convincing clarity" that the article was false and was published with actual malice. *New York Times Co.* v.

Sullivan, 376 U. S. 254, 285-286 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *St. Amant* v. *Thompson*, 390 U. S. 727 (1968). "Actual malice" has been defined as false statements published with knowledge that they are false, or with reckless disregard as to their truth or falsity. *New York Times* v. *Sullivan, supra.* "Reckless disregard" may be shown to exist where there exists "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant, supra,* at 731. In addition, "recklessness may be found where there are obvious reasons to doubt the accuracy of [an] informant or the accuracy of his reports." Id., at 732. In order to preserve First Amendment rights, it is clear that "some erroneous publications [must be protected] as well as true ones." In determining whether actual malice exists, the writer's personal belief that his story is true is important, but is only one factor to consider. Id., at 732.

In the article complained of in this case, the defendant's writer, Edward F. Magnuson, a veteran reporter, purported to quote part of the publication, Justice, which was compiled by the members and staff of the United States Civil Rights Commission. The portion of the article complained of is as follows:

> "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder. The police, says Justice, 'broke through two doors, woke the Monroe couple with flashlights, and forced them to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy." Another officer pushed Mrs. Monroe. Other officers hit and kicked several of the children and pushed them to the floor.

> The police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers.' The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment." Time magazine, November 24, 1961, at 16.

This quote omits the words which immediately preceded it. The Justice report states that these were allegations contained in a complaint. This omission, which has been ruled to be at least "negligent," is not enough to sustain the plaintiff's burden of proof (as outlined above), since the standard for actual malice is far stricter than the standard for negligence. *Pape* v. *Time, Incorporated*, 354 F. 2d 558, 560 (7th Cir. 1965). This court, therefore, must look further into the background of this article.

Mr. Magnuson testified that he read the omitted words, but decided not to include them in the article as it appeared in Time magazine. He explained the omission by pointing out that the Civil Rights Commission, appointed by the President, was set up by Congress to report on the problems of minorities, and its members were highly respected individuals. This meant to him, he testified, that if an example was used in the text of the report, it was considered by the Commission to be "substantially" true, no matter how the example was worded. In some of the examples, the words "alleged" or "allegation" were not used; in others, such as the one before this court, those words were used. Although the Justice report did warn that they had made no conclusive determination of the correctness of the statements of the complainants or officers, the report also said that "the allegations appeared substantial enough to justify discussion in this study." Justice, at 5. This statement modifies the whole report, and thereby makes almost all the examples contained in the report "allegations" of one sort or another, except where

(in two cases) convictions had been obtained. Therefore, the appearance of the word "alleges" at the beginning of the section in Justice describing the plaintiff's activities is not of controlling significance. It was undisputed in the record that Mr. Magnuson in personal good faith interpreted the word "alleges" in the light suggested above. Professions of good faith, however, may not be sufficient in certain cases. *St. Amant, supra.* It is vital to describe the research that went into this article.

It has been stipulated between the parties that Mr. Magnuson consulted three sources before he wrote the article: the Justice report itself, a press release issued by the Civil Rights Commission concerning its Justice volume (Defendant's Exhibit [DX] G), and a news article in the New York Times of November 17, 1961 (DX H). All of these, if they mention the Pape incident at all, refer to the fact that the statements were contained in a complaint. After the article was drafted, it was sent to Champ Clark, then editor of the National Affairs Section, who in turn, according to an established procedure, sent it to the defendant's Research Department. The article was checked for factual accuracy by Miss Karen Burger (now Mrs. Karen Booth), whose deposition was read in open court. Her job was to make corrections in consultation with the senior editor and the writer. She testified that she did not call the omission to their attention, since she had determined that the writer had good reasons for the omission and that the quote was factually accurate. In order to make this determination, she rechecked the three sources that Magnuson used, and also consulted the defendant's informational reference library, commonly known as the "morgue," and obtained all the materials relating to Frank Pape and the case of *Monroe* v. *Pape*, 365 U. S. 167 (1961). Stipulation, ¶¶ 25 and 26; DX I through DX P. In order to determine what information was available to the defendant,

it will be necessary to examine some of these documents in more detail.

The article from the New York Post of Monday, February 27, 1961, DX I, purported to be a first person account by James Monroe of the events surrounding his arrest and subsequent release. The article does not state explicitly that Monroe's statements were merely allegations in a complaint, and the facts related by Monroe follow substantially the account given by Magnuson in the accused article. However, it should be noted that in the introductory paragraphs, the Post said that the narrative which followed was in Monroe's own words and was his "recollection of what happened." The introduction also points out that the Supreme Court has only allowed Monroe to "sue 13 white policemen for abusing him and his family," and that, impliedly, the actual facts might not be as described in the narrative.

The New York Times article (DX P) of February 21, 1961, sounds a similar cautionary note. It said that "[a] Chicago Negro handyman, James Monroe, brought the case after thirteen city policemen broke into his apartment early one morning. He said that they hit him, made him and his wife stand naked while they searched the apartment without a warrant, then held him illegally in jail before finally releasing him without charges." (Emphasis added.) The reference to the fact that a case was brought, and that Monroe "said" that he had been abused highlight the apparent lack of certainty which the New York Times evidenced. Exhibit L also emphasized the fact that Monroe only "claimed" that certain facts were true, and this exhibit was a dispatch from Time's Chicago Bureau correspondent, Dudley Doust. Doust filed another report, one day later than Exhibit L, in which he did not mention that Monroe was only "claiming" that the incidents occurred (DX J). The account in this exhibit did support the state-

ments as made in the accused article. The other articles refer to the decision in *Monroe* v. *Pape, supra,* and do not otherwise discuss the facts, or, they refer to the plaintiff as being an "ungodly tough," but much-decorated police officer. DX K, DX M and DX N.

The Seventh Circuit Court of Appeals, albeit before the *St. Amant* decision, *supra,* had determined that the defendant, when it reworded parts of the Justice report, took the risk that it "might go too far," and indicated that a jury, on the facts before it, could decide that the defendant's acts were "reckless." *Pape* v. *Time, Incorporated,* 318 F. 2d 652, 655 (7th Cir. 1963), as quoted in *Pape* v. *Time, Incorporated,* 354 F. 2d 558, 560 (7th Cir. 1965). However, the court did not have the complete record before it, as is presently the situation before this court.

Even though the defendant showed at trial that the Monroes recovered an $8,000 judgment against the plaintiff for violating their civil rights, this court assumes for the purpose of argument, that the plaintiff has established, through the eight police officers' testimony, that the statements in the article were substantially false. Even assuming this, the plaintiff has the burden of proving "with convincing clarity" that the article was published with actual malice. The statements set forth in the article were only allowed to be published after other articles and dispatches were consulted and a good faith determination made by the writer and the researcher that the Commission had included the quoted portions with the intention that the facts be taken as "substantially" true. This case is far easier than the *New York Times* v. *Sullivan* case, *supra,* where there was no investigation whatsoever into the truth or falsity of the advertisement's representations. This case also does not fall within the St. Amant description of what kinds of publications fell outside the protec-

tions of the First Amendment. There the court said, at 732:

> "The defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." (Emphasis added.)

This decision, after the cases in the Seventh Circuit, indicates that where good faith can be shown, as here, and there has been no "fabrication," etc., the First Amendment demands that judgment be rendered for the defendant publisher. Further emphasizing this conclusion is the possibility that if this case goes to the jury, that this would have a "chilling effect" on the exercise of First Amendment rights and might compel a degree of self-censorship because of the reluctance on the part of a publisher to enter into expensive litigation. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), as cited in *Time, Incorporated* v. *McLaney*, ... F. 2d ....., No. 25585 (5th Cir. Jan. 3, 1969).

At the close of plaintiff's case, defendant moved for a directed verdict. The court might well have granted this. However, in the exercise of extreme caution and with due regard for the statements made by the Court of Appeals in the other *Pape* cases, *supra*, the court decided to wait until all of the evidence was in and a complete record was made. At the conclusion of the introduction of all the evi-

dence, any lingering doubt that the court may have had was completely eliminated.

It is therefore ordered that the defendant's motion for a directed verdict at the close of all the evidence be, and it is hereby granted.

It is further ordered that judgment be and it is hereby rendered for the defendant on the issue of liability, and the cause is hereby dismissed without costs.

/s/ Edwin A. Robson,
Judge.

January 16, 1969.

APPENDIX "B".

First Opinion of the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant,*

v.

TIME, INCORPORATED, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

April 25, 1963

Before SCHNACKENBERG, KNOCH, and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is a diversity libel suit charging that Time, Incorporated, publisher of a national weekly news magazine, defamed plaintiff Pape in an article based on *Justice,* volume 5 of the 1961 report of the United States Commission on Civil Rights.[1] The District

1. Created by the Civil Rights Act of 1957, 42 U. S. C. § 1975, to study civil rights problems and report to the President and Congress. The Supreme Court described the Commission's statutory duties in *Hannah* v. *Larche,* 363 U. S. 420, at 441 (1960):

> • • • its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

Court dismissed the complaint on Time's motion, and plaintiff has appealed.

Time's motion admitted, for purposes of this appeal, the well pleaded facts: Plaintiff, at the time of the alleged libel, was Director of Security for Chicago Thoroughbred Enterprises, Incorporated, which operated race tracks in metropolitan Chicago. He was on leave from his position as a captain of Chicago Police. He enjoyed a good reputation.

In its issue of November 24, 1961, Time published the alleged defamatory matter in reporting the filing of *Justice* by the Commission. The material subject of suit appears under "Part VII. Equal Justice Under Law." In Part VII are two chapters: "1. Introduction; and 2. Unlawful Police Violence."

Chapter 2, "Unlawful Police Violence," briefly describes eleven typical cases of police brutality. The Commission states: "The allegations of misconduct are supported in several cases by criminal convictions * * * or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations. In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appeared substantial enough to justify discussion in the study."[2]

The Time article, captioned "Civil Rights—Dawdling on the Corner,"[3] was based on that part of Chapter 2 of the

2. 5 U. S. Comm. on Civil Rights Report 5 (1961).

3. The caption "dawdling on the corner" is taken from a separate statement filed in the Report by Reverend Theodore M. Herburgh, C. S. C., President of the University of Notre Dame, and a Member of the Commission. In part, Commissioner Hesburgh stated:

> Personally, I don't care if the United States gets the first man on the moon, if while this is happening on a crash basis,

(Footnote continued on next page.)

Commission Report entitled "Patterns of Police Brutality." Time noted the publishing of *Justice* by the Commission and went on to report incidents in Georgia and Chicago, two of the eleven incidents revealed in the Commission Report. The Chicago incident involved the arrest by Pape and other Chicago police officers of a Negro family named Monroe on Chicago's west side.[4]

This District Court's opinion, sustaining Time's motion to dismiss, was that the article was a fair and accurate account of the Commission's Report, a matter of public interest and legitimate subject of comment of an honest purpose; and that the article did not exceed the bounds of fair comment and was not actionable.

The question is whether the District Court erred in finding, under Illinois law, that the complaint failed to state a claim upon which relief could be granted. The subordinate, vital question is whether Time's report of what the Commission said about the Pape incident is fair comment.

Time's article introduced the reader to *Justice* as carrying "a chilling text about police brutality" and that "it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the Commission." The reader is told, in a footnote, who the noted educators

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we dawdle along here on our corner of the earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hypocrites to all the world.

5 U. S. Comm. on Civil Rights Report 168 (1961).

4. Based on the alleged wrongful conduct of Pape and his fellow officers in making that arrest, Monroe brought a civil rights suit which, on appeal, *Monroe* v. *Pape*, 365 U. S. 167 (1961), was remanded for trial to the Northern District of Illinois, Eastern Division.

are.[5] Time's second paragraph begins, "The bluntly frank report tells of a police officer, referred to only as 'Y', in Dawson, Ga." This and the third paragraphs tell of the Georgia incident through quotations, detailing the police brutality, from the victim, Brazier, and his wife, and quotations from the Report. The third paragraph concludes in Time's statement, "Brizier died five days later, and 'Y' was never punished." In the fourth paragraph Time reported the Pape incident.

The Pape incident is set forth in the Commission Report in this way:[6]

> *Search, seizure and violence: Chicago, 1958.*—The Supreme Court of the United States decided the case of *Monroe* v. *Pape* on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Acts on the basis of a complaint which alleged that:[7]
>
> . . . [O]n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living rom; that Detective Pape struck Mr. Mon-

5. Members of the United States Commission on Civil Rights: Chairman Dr. John A. Hannah, President of Michigan State University; Vice Chairman Robert G. Storey, head of Southwestern Legal Center and former Dean of Southern Methodist University Law School; Reverend Theodore M. Hesburgh, President of the University of Notre Dame; Dr. Robert S. Rankin, Chairman of the Political Science Department, Duke University; Erwin N. Griswold, Dean of the Harvard University Law School; and Spottswood W. Robinson III, Dean of the Howard University Law School.

6. U. S. Comm. on Civil Rights Report 20, 21 (1961).

7. The Commission set forth the facts alleged in the complaint by quoting from Justice Frankfurter's dissent in *Monroe* v. *Pape*, 365 U. S. 167, 202-259 (1961).

roe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him.

Time began its report of the Commission's statement of the Pape incident this way: "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder." It continued: "The police, says *Justice*, broke through two doors * * *." Time then quoted the rest of the statement of the Commission verbatim. The Time paragraph concludes: "The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment."

We agree with the District Court that Time was not absolutely privileged in writing the article. The absolute privilege of the Commission did not protect Time. It had a "qualified or conditional privilege," *Cresson* v. *Dispatch Printing Co.*, 291 Fed. 632 (D. C. Minn. 1923), to comment fairly upon, and criticize fairly, the Commission report. Under Illinois law, governing here, Time can be liable if it goes beyond that limit and "states as a fact that which is not true * * *." *Cook* v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 580, 64 N. E. 2d 751, 761 (1945), *Belt* v.

Tribune Co., 6 Ill. App. 2d 489, 128 N. E. 2d 638 (1955). "It is fundamental that fair comment and criticism cannot be predicated on an unfair or false statement of facts." *Belt* v. *Tribune Co.*, 6 Ill. App. 2d 489, at 494, 128 N. E. 2d 638, at 640. The rule applies to writing about crime. *Cook* v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 585, 64 N. E. 2d 751, 763 (1945).

The test of the fairness of the Time article is the meaning which readers of common and reasonable understanding would ascribe to the language used. *Belt* v. *Tribune Co.*, 6 Ill. App. 2d 489, 493, 128 N. E. 2d 638, 640 (1955). And as Justice John C. Lewe said in *Dilling* v. *Illinois Publishing & Printing Co.*, 340 Ill. App. 303, 306, 91 N. E. 2d 635, 637 (1950), "* * * a person of ordinary intelligence should read a newspaper article * * * with ordinarily intelligent discrimination."

The question before us involves not what the Commission Report of 307 pages says of Pape, but only what the Time article says about the Report. The reader is set by the introduction, conditioned by the Georgia incident and its stark ending, and prepared to read how the Chicago police treated Monroe's family in the very early morning while "ostensibly" investigating a murder. Then the reader is told that *Justice* "says" Pape and others *did* what the Report merely said Monroe's complaint *alleged* Pape and others had done. The closing paragraph, relied on by Time to immunize it from liability, says the officers were not punished—as the article earlier stated "Y", in the Georgia incident, was not punished.

We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go to far, *Cook* v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 580, 582, 64 N. E. 2d 751, 761, 763 (1945), quoting Judge O. W. Holmes, Jr. A jury could find that Time went beyond the

limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission Report. It is our opinion that a jury could read the Time article as stating that the Report said Pape and his fellow officers *did* what the Commission Report merely said the *Monroe* complaint *alleged they did*. The typical newspaper reader could take from the article the impression that Pape and the other officers were not really investigating a murder when they mistreated the Monroe family, that the noted educators in *Justice* found that the Monroes were mistreated by Pape and the other officers, and that they were not being punished but ought to be.

It is true that the Commission had the facts alleged in the *Monroe* complaint, from which it quoted, investigated sufficiently to justify their use for the Commission's purposes in the Report. But the Commission was careful to state, at the beginning of its Report: "In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements."[8] The Time article, however, does not say that. The article says that the Commission Report "stands as a grave indictment, since its facts were carefully investigated." But the Report does not say that. The "carefully investigated" statement in Time adds weight to its quotation, substituting the words "says *Justice*" for the words of the Report, "* * * a complaint which alleged that."

Time argues that the "innocent construction" rule requires this court to read the article "innocently," citing *John* v. *Tribune Co.*, 24 Ill. 2d 437, 442, 181 N. E. 2d 105, 108 (1962). We are required by the rule in that case to give the Time article its "natural and obvious meaning." To read the article innocently, Time asks us to read the

8. 5 U. S. Comm. on Civil Rights Report 5 (1961).

article as *not* saying what it does say. It says that the Civil Rights Commission said that Pape had, among other things, assaulted the Monroe family and violated their civil rights. In fact, the Commission said that a complaint in a civil action *alleged* that Pape had done these things.

The complaint states a claim upon which relief can be granted. The District Court erred in ordering it dismissed.

This court takes judicial notice that, upon trial of *Monroe* v. *Pape* after remand by the Supreme Court, a verdict and judgment was recently entered for Monroe. After the District Court denied defendants' post-trial motions, except for a reduction of the verdict, Time made a motion in this court to dismiss the appeal for mootness. That motion was taken with the case and is hereby denied.

The judgment is REVERSED, and the cause REMANDED for further proceedings.

SCHNACKENBERG, *Circuit Judge*, dissenting:

The foregoing opinion's importance lies in its alarming invasion of the right of the press to publish its interpretation of the factual situation presented in an official report issued by a commission created by the Congress of the United States. 42 U. S. C. A. § 1975.

From the Commission's report entitled "Justice", it is clear that the Commission had a basis for the statements which it made in its report.[1] It referred, at page 105, to "a comprehensive review of available evidence", while, at page 5, it disclaimed making any conclusive determination as to whether the complainants or the police officers were correct in their statements, this being "a function of a court". But it expressly stated that "allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn

1. Said act required the filing of a report. See § 1975c(b).

testimony, affidavits from eyewitnesses, or by *staff*[2] field investigations". That case not having come to trial in court at that time, the Commission, for convenience, expressly quoted the charges of the Monroe complaint as set forth by Mr. Justice Frankfurter in his dissent, 365 U. S. 167, at 203-204.

Justice dealt with numerous other cases where police brutality charges had been made, discussed violence by others than police, considered state and local remedies and the status and rights of the American Indian.

At 112, Justice made recommendations to Congress as to the advisability of remedial legislation. The report was duly transmitted to Congress.

The report known as Justice was privileged and nonactionable in a libel suit. A published article which fairly comments upon a governmental report is likewise privileged and nonactionable, under Illinois law. The publication in the case at bar is a fair comment upon the issuance of a governmental report and its contents. Plaintiff cannot force publishers, under threat of libel, to conceal the fact that the Commission pointed to his alleged conduct as a basis for its conclusions and recommendations to Congress.

I would affirm.

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2. Italics supplied for emphasis. § 1975d (a) provided that there should be a full-time *staff* director for the Commission.

APPENDIX "C".

Second Opinion of the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant.*

vs.

TIME, INCORPORATED, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 28, 1965

Before DUFFY and SWYGERT, *Circuit Judges,* and GRUBB, *Senior District Judge.*

DUFFY, *Circuit Judge.* Plaintiff Pape brought this suit seeking damages for libel. Jurisdiction was based upon diversity of citizenship. The complaint alleged the defendant, Time, Incorporated, publisher of the national weekly news magazine "Time", had defamed plaintiff in its November 24, 1961 issue. The allegedly libelous story reported the issuance and summarized the contents of the United States Civil Rights Commission's 1961 annual report. This Report entitled "Justice" is in book form. Chapter 2 is devoted largely to a description of alleged police brutality to Negroes.

The Time article entitled "Civil Rights—Dawdling on

the Corner", was based largely on Chapter 2 of the Commission's Report entitled "Patterns of Police Brutality." Time reported an incident which it claimed had occurred in Chicago involving brutality by Pape and other police officers while arresting members of a Negro family named Monroe.

In the District Court, defendant moved to dismiss—in effect, urging the complaint failed to state a claim upon which relief could be granted. The District Court granted the motion. On appeal, this Court reversed. *Pape* v. *Time, Incorporated,* 318 F. 2d 652. We stated that the subordinate, vital question was whether Time's story of the Commission's Report of the Pape incident was fair comment.

In our opinion, we pointed out that the question then before us was not what the Commission's Report had said about Pape, but rather, what Time's article had said about the Report. We then noted that Time's article told the reader that the Report stated that Pape and others had actually committed certain acts. In fact, the Report had merely said that these acts were allegations in Monroe's complaint.

We stated "Under Illinois law, governing here, Time can be liable if it goes beyond that limit [fair comment] and states as a fact that which is not true. . . ."

We then said "We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go too far. . . . A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission report."

We decided that the complaint stated a claim upon which

relief could be granted, and we reversed and remanded for further proceedings.

Subsequent to remand, the Supreme Court of the United States decided *New York Times Co.* v. *Sullican,* 376 U. S. 254. Therafter, defendant took Pape's pretrial deposition. Pape testified he had been in the Chicago police department since 1933 and was presently a captain of police. He admitted that he and police officers under his command had gone to the Monroe house on the evening in question. At that time, he was deputy chief of detectives for Chicago. He had been appointed to that position by the Commissioner of Police. His permanent rank at that time was lieutenant of police.

In *New York Times,* the Supreme Court stated (376 U. S. p. 283) "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action,[23] the rule requiring proof of actual malice is applicable."

Footnote 23 referred to, stated in part—"We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. . . ." It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official. . . ."

Plaintiff urges that the Supreme Court thus confined its holding in *New York Times* to an "elected" public official. Also, that plaintiff was not a "public official" within the meaning of that case because he had neither been elected to his office, nor appointed nor confirmed in his appointment by an elective body.

We do not read *New York Times* v. *Sullivan* as being

limited to an elected public official. The Supreme Court based its decision, at least in part, upon certain precedents involving appointed officials. In one of the cited cases, the libel plaintiff was a Deputy Superintendent of Police for the city of Detroit. *Lawrence* v. *Fox*, 357 Mich. 134, 97 N. W. 2d 719. In another of the cited cases, the plaintiff was the Chief of Police of Los Angeles—*Snively* v. *Record Publishing Company*, 185 Cal. 565, 198 P. 1.

Subsequent decisions to *New York Times* clearly indicate the courts do not understand the rule announced in that case to be confined to elected public officials. In *Henry* v. *Collins*, 380 U. S. 356 (1965), the Supreme Court applied the *New York Times* doctrine to the Chief of Police of Clarksdale, Mississippi. The Chief was an appointed officer.

In *Tucker* v. *Kilgore*, 388 S. W. 2d 112 (Ky. 1965), the Court applied the *New York Times* doctrine to an ordinary police patrolman in the city of Louisville, Kentucky. See also *State* v. *Browne*, 206 A. 2d 591 (N. J. 1965) and *Matassa* v. *Bel*, 164 So. 2d 332 (La. 1964).

We hold that on the date Pape arrested James Monroe, when Pape held the position of deputy chief of detectives and lieutenant of police, he was a public official as that designation was used in *New York Times* v. *Sullivan*.

We turn, therefore, to consider whether the existence of "actual malice" by Time, Incorporated presented a jury question. The Supreme Court in *New York Times* v. *Sullivan*, stated at 376 U. S. 279-280: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . ."

The record before us shows that Time, Incorporated was, at least, negligent in printing as established facts, matters and events which the Commission's Report stated were mere allegations in a complaint. But, negligence is not enough.

In *New York Times*, the newspaper admitted it had had evidence in its own files affirmatively showing the falseness of numerous statements in the publication . . . 376 U. S. at pages 287-288; also that the Times had accepted and published the advertisement without in any way checking its accuracy against outside sources or material in its files. 376 U. S. 287.

The Supreme Court further said—376 U. S. at pages 287-288—"We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice."

In *Garrison* v. *Louisiana*, 379 U. S. 64, the Supreme Court applied the *New York Times* rule to criminal libel, holding that actual malice must be proved to convict an individual for libeling a public officer. The Court there defined malice as "only those false statements made with the high degree of awareness of their probable falsity. . . ." 379 U. S. 74.

The burden of proving actual malice is upon Pape. He admitted in his pretrial deposition that he did not know anyone at Time, and, in fact, he does not claim the article was published with any deliberate attempt to harm him. He argues, however, that this question is already settled by reason of our decision in *Pape* v. *Time, Incorporated* (1962), 318 F. 2d 652.

Our previous decision was made prior to *New York Times* v. *Sullivan*. There, the District Court had dismissed the complaint on the defendant's motion so that all the well-

pleaded facts stood admitted before us. We applied Illinois law.

We must now determine whether there is sufficient showing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false.

As stated in our previous decision—". . . Time took the risk when it reworded parts of the Commission's Report that it might go too far. . . ." We noted that Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (318 F. 2d at page 655)—"It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow [sic] officers *did* what the Commission Report merely said the Monroe complaint *alleged they did*."

We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false. Therefore, it was error for the District Court to grant defendant's motion for a summary judgment.

The judgment of the District Court is reversed and remanded for further proceedings.

REVERSED AND REMANDED.

APPENDIX "D".

Third Opinion of the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant,*

vs.

TIME, INCORPORATED, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 15, 1969.

Before DUFFY, *Senior Circuit Judge,* KILEY and KERNER, *Circuit Judges.*

DUFFY, *Senior Circiut Judge.* This is a suit for libel brought by plaintiff, a Chicago police officer, against Time, Incorporated, the publisher of Time Magazine. The claim of plaintiff is based upon a story printed in Time Magazine under date of November 24, 1961. This appeal is from an order of the District Court granting, at the close of all of the evidence, a directed verdict in favor of defendant.

Pape became a policeman in March 1933. He was promoted to the position of Deputy Chief of Detectives in 1957. He held this position on October 27, 1958. He was promoted to Captain in 1959. During the period Pape was a sergeant of police, he participated in hundreds of ar-

rests. On November 24, 1961, plaintiff, while on leave of absence from his police position, was employed as Director of Security for the Chicago Thoroughbred Enterprises, Inc., which company operates several race tracks in the Chicago area.

"Justice", Volume 5 of the official 1961 Report of the United States Commission on Civil Rights, was issued on November 17, 1961. The Report stated: "In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements."

Under the heading of "Search, seizure, and violence: Chicago, 1958," the Commission's Report stated that "... on the basis of a complaint which alleged that: . . ." It thereafter related an alleged occurrence on the part of detective Pape and twelve other police officers during which it claimed that Monroe and members of his family were abused and Monroe was arrested and questioned about a recently committed murder.

This is the third time this case has been before us. In *Pape* v. *Time, Incorporated*, 318 F. 2d 652, 655 (7 Cir., 1963) we reversed the judgment and remanded the case for further proceedings. In that opinion we stated: "We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go too far, ... A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission Report."

After the remand, the Supreme Court of the United States decided *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). Thereafter, this case came before us for a second time. Our opinion in that case appears in *Pape* v. *Time, Incorporated*, 354 F. 2d 558 (7 Cir., 1965) (second

opinion). We again reversed the judgment of the District Court and remanded. We held that Pape was a public official as that designation was used in *New York Times Co. v. Sullivan, supra.* There is no reason to now reverse that holding. We recognized the doctrine "[T]hat prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. * * *" *Pape* v. *Time, Incorporated, supra,* at page 560.

In the second opinion at 354 F. 2d 560, we quoted from our first opinion as follows: "It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow (sic) officers *did* what the Commission Report merely said the Monroe complaint *alleged they did.*'" We again reversed the judgment of the District Court and remanded.

The Supreme Court has handed down several opinions explaining the language of the *New York Times Co.* v. *Sullivan, supra,* case. Among the cases which we have carefully considered is *Garrison* v. *Louisiana,* 379 U. S. 64, 74 (1964). The Court there held that recklessness requires a showing of a high degree of awareness of probable falsity. In *Henery* v. *Collins,* 380 U. S. 356, 357 (1965), the Court emphasized its interpretation of an "intent to inflict harm through falsehood." *Beckley Newspapers Corp.* v. *Hanks,* 389 U. S. 81, 84 (1967) and *St. Amant* v. *Thompson,* 390 U. S. 727, 731 (1968).

In our second opinion we stated at 354 F. 2d 560 "Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit." Since that time, the author of the Time article, one Edward F. Magnuson, has so testified. He admits that *when he wrote the article* he

knew the Commission's Report stated that the alleged assaults on Monroe and his family were based upon a complaint which made such allegations. Magnuson was a former police reporter for the Minneapolis Tribune and he testified he knew the meaning of the word "complaint" and of the word "alleged." However, Magnuson deliberately and knowingly failed to mention in his article that his story of the alleged conduct and action of Pape and the other police officers was based on an allegation in a complaint in a pending civil suit.

We are here concerned with Time's falsification of what the Report said rather than the falsification of a story about the Monroe incident. Surely, a deliberate act of omission can show malice as well as an act of commission. Time omitted mention of the fact that when the article was written, the Pape-Monroe incident was reported in "Justice" as allegations in a complaint, not as proven fact. And the alleged injury to Pape was in Time's stating that the Commission reported that incident as true, instead of stating that the Commission reported it as alleged to be true. The jury could conclude that this amounted to an "intent to inflict harm through falsehood." *Garrison* v. *Louisiana*, 389 U. S. 64, 74 (1964); *Henry* v. *Collins*, 380 U. S. 356, 357 (1965).

We think pertinent the recent statement of the Court of Appeals for the Second Circuit in *Goldwater* v. *Ginzberg*, 414 F. 2d 324, 337 (2 Cir., 1969): "One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context."

We hold the District Court was again in error in granting defendant's motion for a directed verdict.

The judgment of the District Court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

KILEY, *Circuit Judge*, concurring.

I concur in Judge Duffy's opinion that this case should have gone to the jury.

It is my view that the testimony of Magnuson, referred to in Judge Duffy's opinion, was sufficient prima facie to prove that Time published the article in suit "with knowledge that it was false." The publication of the article with the words in the Commission report deliberately omitted could reasonably be found to be a publication of "a defamatory falsehood . . . with knowledge that it was false." This met the test of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), under which either knowledge of falsity or reckless disregard of whether the material is false or not is required for proof of the vital element of "actual malice." I agree that the case progeny of *New York Times Co.* v. *Sullivan* has not changed the Supreme Court's test.

The effect of doing to the Commission report what Time did to it was to give the report an additional reader value. The Time article does not contain the various qualifications in the Commission report which Time urges upon us now with respect to the context in which the Commission treated the Monroe-Pape incident. We must consider the Time article as it was published.